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No. 97-55

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

FRANK KEATING, Governor of the State of Oklahoma and KEN FEAGINS, a nonresident individual,

Petitioners,

—v.—

STATE OF OKLAHOMA, ex rel., OKLAHOMA TAX COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OKLAHOMA—DIVISION NO. 1

MOTION FOR LEAVE TO FILE AND BRIEF OF OKLAHOMANS FOR INTEGRITY IN GOVERNMENT AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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MOTION BY OKLAHOMANS FOR INTEGRITY IN GOVERNMENT FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION

Oklahomans for Integrity in Government respectfully move for leave to file the attached brief *amicus curiae*. Consent of the attorneys for the petitioners has been obtained. The consent of the attorneys for the respondent was requested but refused.

Oklahomans for Integrity in Government ("OIG") is a bipartisan group of conservative Oklahoma citizens working for a just and moral government. This group of concerned citizens consists of approximately 475 members. OIG is recog-

nized statewide as a governmental watchdog organization which strives to keep its membership informed on issues of public importance to Oklahoma. For example, OIG publishes and distributes to its members *The Oklahoma EAGLE'S EYE*, a monthly newsletter which contains "Straight Talk", "Letters to the Eagle", and "Did You Know?" sections.

The purpose of O.I.G. is primarily an Educational Organization. Specifically based on the premise that if the General Public has the truthful information about any public issue and they are given an opportunity to make a choice on the issue; a majority of the people will make the right decision. O.I.G. serves as a medium to the General Public and affords them the opportunity to be heard on issues through the News Publication of the Eagle's Eye.

O.I.G.'s interest in the amendment to Section 2362 of the Oklahoma Tax Code is, in part, that it is exactly what the proponents say it isn't. 75% of O.I.G. Board of Directors were the motivating force behind the passage of State Question 640, an amendment to the Oklahoma Constitution that was approved by a vote of the people in a statewide general election. Senate Bill 1121 is enabling Legislation that brought more money into Okla. Treasury—that means more money was fleeced from the Okla. Tax Payers—which means the Tax Payers were taxed by the State of Oklahoma more heavily.

Because OIG advocates less governmnent and lower taxes, this case is of great concern to the *amicus curiae*.

Accordingly, Oklahomans For Integrity In Government respectfully move for leave to file the attached brief *amicus curiae*.

Respectfully submitted,

/s/ KEN FEAGINS

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Date: August 7, 1997

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QUESTIONS PRESENTED

1. Is this Court's prior decision in *Maxwell v. Bugbee*, 250 U.S. 525 (1919), viable under *Stare Decisis*?

2. Whether the Oklahoma Court of Appeals has read *Maxwell* too broadly.

3. Should the rational of *Maxwell v. Bugbee*, 250 U.S. 525 (1919) be applied to a progressive state income tax?

PARTIES TO THE PROCEEDING

Respondent the State of Oklahoma, ex rel., the Oklahoma Tax Commission was the Respondent-Appellee below. Petitioner Governor Frank Keating succeeded Governor David Walters as Governor of the State of Oklahoma and is automatically substituted as a party pursuant to Sup.Ct.Rule 35.3. Governor Walters and Ken Feagins were the Petitioners-Appellants below.

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BRIEF BY OKLAHOMANS FOR INTEGRITY IN GOVERNMENT AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

INTEREST OF *AMICUS CURIAE*

The interest of *amicus curiae* appears in the foregoing motion.[1]

[1] *Counsel of Record* for Petitioners, Ken Feagins, authored this brief. Sup.Ct.R. 37.6.

STATEMENT OF THE CASE

Oklahoma has a progressive income taxation scheme. Under a progressive tax system, the tax rate of a person who earns $50,000.00 per year is higher than that an individual who earns $5,000.00. Petitioners seek certiorari to review an opinion of the Court of Appeals of the State of Oklahoma - Division No. 1, which affirmed the trial court's judgment for Respondent. At issue is the constitutionality of Section 27 of Senate Bill 1121, which amended Section 2362 of the Oklahoma Tax Code (Okla. Stat. tit. 68 § 2362 (1994)) ("Section 2362").

The amendment to Section 2362 changed the method of calculating the state income tax liability of **nonresident** individuals. Prior to the amendment, Section 2362 provided that the taxable income of a nonresident individual was the same as if he or she were a resident individual and the nonresident's adjusted gross income as reported to the federal government was excludable from state taxable income unless the income was attributable to ownership of property, conduct of business, trade, or profession, or other business or property in Oklahoma. Section 2362 currently takes into account a nonresident's out-of-state income having no nexus with the State. As a direct result of the higher tax rate imposed by the Section 2362's inclusion of the nonresident taxpayer's out-of-state income, the current economic reality facing nonresident state income taxpayers in Oklahoma is more money out-of-pocket, paid to the Oklahoma Tax Commission in Oklahoma Income tax.

Prior to the amendment to Section 2362, the Oklahoma Tax Commission predicted that the amendment would raise an additional 18 million dollars ($18,000,000.00) per year in revenue.

Petitioners commenced this action in state district court and challenged the constitutionality of Section 2362 under the Oklahoma and United States Constitutions. Petitioners'

federal constitutional claims included the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, the Privileges and Immunities Clause and the Commerce Clause of the United States Constitution.

Petitioners' case is the latest in a series of recent challenges to the decisions of state courts of last resort that have relied upon this Court's prior decision in *Maxwell v. Bugbee*, 250 U.S. 525 (1919), to uphold similar state progressive income taxation schemes. By taking nonresidents' out-of-state income into account in order to impose a higher tax rate, Section 2362 indirectly taxes the extraterritorial income of nonresidents and derives the tax from sources beyond the borders of Oklahoma. *See Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S.Ct. 2214, 2222 n.11 (1995).

As in *Matteson v. Director of Revenue, State of Missouri*, 909 S.W.2d 356, 358-59 (Mo. 1995); *Brady v. State*, 607 N.E.2d 1060 (N.Y. Ct. App. 1992), *cert. denied*, 113 S.Ct. 2998 (1993); *Stevens v. State Tax Assessor*, 571 A.2d 1195, 1197 (Me. 1990), *cert. denied*, 498 U.S. 819 (1990); *Aronov v. Secretary of Revenue*, 371 S.E.2d 468, 471 (N.C. 1988), *cert. denied*, 109 S.Ct. 1568, *reh'g denied*, 489 U.S. 1096 (1989); *Wheeler v. State*, 249 A.2d 887, 891 (Vt. 1969), *appeal dismissed*, 396 U.S. 4 (1969), *and United States v. Kansas*, 810 F.2d 935, 938 (10th Cir. 1987), in *Walters et al., v. State of Oklahoma, ex rel., Oklahoma Tax Commission*, 935 P.2d 398 (Okla. Ct. App. 1996), the Oklahoma Court of Appeals relied upon and extended the *Maxwell* holding to uphold under the federal Constitution Petitioners' challenges to Section 2362.

In each of the foregoing decisions, the court decided a substantial and unsettled question arising under the U.S. Constitution by *extending* the *Maxwell* holding. *Maxwell* specifically addressed a New Jersey progressive estate "**death**" tax. This Court in *Maxwell* did not address a state **income** taxation scheme. Each court, *supra*, however, relied on *Maxwell* to

uphold under the federal constitution the inclusion in a state progressive income taxation scheme a nonresident's extraterritorial income having no nexus to the taxing jurisdiction. The result—a higher tax rate for the **nonresident** taxpayer and a larger tax that is derived from sources beyond the borders of Oklahoma. In this court's recent decision in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S.Ct. 2214, 2222 n.11 (1995), this Court unequivocally stated that a State is limited in its power to tax a nonresident's income to income derived from sources **within** the State.

The Petitioners herein are the most recent participants in this expanding waive of national controversy.

REASONS FOR GRANTING THE WRIT

The Petition for a Writ of Certiorari in this case should be granted for reasons stemming from one specifically set forth in Rule 10(c) of the Rules of the United States Supreme Court, because the Oklahoma Court of Appeals, several other state courts of last resort, and the United States Court of Appeals for the Tenth Circuit have "decided an important question of federal law that has not been, but should be, settled by this Court". Sup.Ct.R. 10(c).

A. The Opinion Below, The Decisions Of Other State Courts of Last Resort, And The Decision Of United States Court Of Appeals For The Tenth Circuit, Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court

Certiorari may be granted despite the absence of a conflict where a state court has decided a substantial and unsettled federal question arising under the Constitution. *See*, Sup.Ct.R. 10(c); Robert L. Stern *et al.*, *Supreme Court Practice* 209-210 (7th ed. 1993) (*citing Oregon v. Kennedy*, 456 U.S. 667, 668-

69 (1982)). By relying on *Maxwell* to uphold under the federal Due Process Clause the state's inclusion of nonresidents' extraterritorial—nontaxable —income to determine the tax rate in a progressive income taxation scheme, each court referenced, *supra*, decided an important and substantial federal question arising under the federal Constitution that was not resolved by the specific *Maxwell* holding. The specific issue raised by the Petition remains unresolved by this Court.

Accordingly, despite the absence of a conflict among the lower courts, this Court should grant certiorari and resolve the specific federal question raised by the Petition. This malignant source of ongoing controversy and litigation should be removed. *See, e.g., Malloy v. Hogan*, 378 U.S. 1 (1964); *Gideon v. Wainwright*, 371 U.S. 335 (1963).

1. *Maxwell* Is No Longer Viable Under *Stare Decisis*

Because the issue raised by the Petition is a constitutional question, this Court is less constrained by the principle of *stare decisis*:

> " '*Stare decisis* is usually a wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right. . . . This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. **But in cases involving the Federal Constitution**, where correction through legislative action is practically impossible, **this Court has often overruled its earlier decisions**. The Court bows to lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.' "

Edelman v. Jordan, 415 U.S. 651, 671 n.14 (1974) (*citing Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-408 (1932) (Brandeis, J., dissenting)) (emphasis added). In addition, Jus-

tice Douglas observed that "[t]he place of *stare decisis* in constitutional law is even more tenuous" and "[s]o far as constitutional law is concerned *stare decisis* must give way before the dynamic component of history." William O. Douglas, *Stare Decisis*, 49 Colum.L.Rev. 735, 736-37 (1949).

Historically, this Court has been inclined, due to changed economic conditions and social policies, to overrule on constitutional grounds cases related to the taxing power of state governments. For example, during one thirty-year period between 1860 and 1890, this Court overruled (expressly or in effect) eighteen controlling precedents. *See, id.* In another period "from 1937-March 28, 1949", out of 30 cases the Court overruled, 21 of those were on constitutional grounds. *See, id.* And out of those 21 cases this Court overruled on constitutional grounds, the "largest group—8 in number—related to the taxing power of state and federal governments". *Id.* at 743. "Tax rates had become more burdensome than ever before in our history". *Id.*

In *Maxwell*, this Court implemented a formalistic approach acceptable in 1919 to review a New Jersey progressive inheritance tax statute that required the inclusion of the entire estate of a nonresident decedent, wherever the property was located, to determine the rate by which the New Jersey property would be taxed. The New Jersey statute subsequently reduced the tax amount to reflect the percentage of the nonresident decedent's estate located in New Jersey. *Maxwell*, 250 U.S. at 532-33. A divided Court (5/4 decision) rejected the federal constitutional challenges to the statute, including Due Process.

Five members of the Court employed a formalistic approach to decision-making and stated:

> "It is not disputed that, consistently with the Federal Constitution, **a State may not tax property beyond its territorial jurisdiction**, *but* **the subject-matter here**

> **regulated** is a *privilege to succeed to property* ***which is within the jurisdiction of the State.***
>
> * * *
>
> In the present case the State imposes a *privilege tax*, clearly within its authority, and it has adopted as *a measure of that tax* the proportion which the specified local property bears to the entire estate of the decedent. The transfer of certain property within the State is taxed by a rule which considers the entire estate in arriving at the amount of tax. *It is in no just sense a tax upon foreign property, real or personal.*"

Maxwell, 250 U.S. at 539 (emphasis added).

On the other hand, four justices, including Justice Holmes, rejected the majority's formalism. They applied an **economic realities and practical operation** approach. The economic reality was an unconstitutional deprivation of property without due process. Justice Holmes stated in relevant part:

> "It seems to me that *when property outside the State is taken into account for the purpose of increasing the tax upon property within it, the property outside is taxed in effect, no matter what form of words may be used.* It appears to me that this cannot be done, even if it should be done in such a way as to secure equality between residents in New Jersey and those in other States."

Maxwell, 250 U.S. at 544 (Holmes, J., dissenting) (emphasis added).

Since *Maxwell* was decided at the turn of the century, historic events have occurred which make *Maxwell* obsolete in light of current economic conditions and social policies in this country. For example, a result of advancements in transportation, technology, and communication is the unavoidable trend toward an international globalization of our economy. The term "interstate commerce" has a vastly different connotation and meaning in 1997 than it did in 1919. It is quite

common in 1997 for a resident of one state to earn income in several states and to be taxed accordingly. Moreover, this Court has since rejected the antiquated formalism utilized by the *Maxwell* majority. *See, e.g.*, *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 443-44 (1940).

In *J.C. Penney*, this Court stated:

> "A tax is an exaction. Ascertainment of the scope of the exaction—what is included in it—is for the state court. **But the descriptive pigeon-hole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction**. 'In whatever language a statute may be framed, **its purpose must be determined by its natural and reasonable effect**.' *Henderson v. Mayor of New York*, 92 U.S. 259, 268. Such has been the repeated import of the cases which only recently were well summarized by the guiding formulation for adjudicating a tax measure, that '**in passing on its constitutionality we are concerned only with its practical operation**, *not its definition or the precise form of descriptive words which may be applied to it.*' *Lawrence v. State Tax Commission*, 286 U.S. 276, 280."

Wisconsin v. J.C. Penney Co., 311 U.S. at 443-44 (emphasis added).

Maxwell has been questioned by this Court and by members of the academy. *See Frick v. Pennsylvania*, 268 U.S. 473, 495 (1924) (*noting* that the *Maxwell* holding "is on the border line, as is evidenced by the dissent of four members of the court."). *See*, Walter Hellerstein, *Some Reflections on the State Taxation of a Nonresident's Personal Income*, 72 Mich.L.Rev.1308, 1317 n.53 (1974); Charles L.B. Lowndes, *Rate and Measure in Jurisdiction to Tax—Aftermath of Maxwell v. Bugbee*, 49 Harv.L.Rev. 756, 768-773 (1936) (*discussing* the application of the Maxwell holding to a progressive income tax); *id.* at 770 (stating "[i]t is difficult, however,

to imagine anything more iniquitously unfair than the application of the *Maxwell v. Bugbee* formula to income taxation in the present state of the decisions on state jurisdiction to tax income."). A jurisdiction, such as Oklahoma, may tax *all* the income *of its* ***residents***, even income earned outside the taxing jurisdiction. A taxing jurisdiction such as Oklahoma is much more restricted in its power to tax **nonresidents** and must tax only the income **derived from sources within the State**:

> "**For nonresidents**, *in contrast*, jurisdictions generally may tax **only income earned *within the jurisdiction***. See *Shaffer v. Carter*, 252 U.S. 37, 57, 40 S.Ct. 221, 227, 64 L.Ed. 445 (1920) (as to residents, a State 'may, and does, exert its taxing power over their income from all sources'; **as to nonresidents**, '*the tax is only on such income* as is derived from . . . **sources [within the State]**')"

Oklahoma Tax Comm'n v. Chickasaw Nation, 115 S.Ct. 2214, 2222 n.11 (1995) (emphasis added).

Because the issue raised by the Petition is a constitutional question and the historic circumstances present at the time *Maxwell* was decided have changed dramatically, wisdom, the rule of reason and the doctrine of *stare decisis* should lead this Court to distinguish, modify or simply overrule *Maxwell* in light of Footnote 11 in *Chickasaw Nation* and today's current facts.

2. The State Court Below Has Read *Maxwell* Too Broadly

This Court may grant certiorari to determine whether the state court has properly interpreted, applied, or extended a prior decision of this Court. *Oregon v. Mathiason*, 429 U.S. 492, 493 (1977) (certiorari granted because state court "has read *Miranda* too broadly").

The *Maxwell* decision addressed a progressive state privilege **death** tax, not a progressive state **income** tax such as contemplated by Section 2362. Moreover, in *Oklahoma Tax Comm'n v. Chickasaw Nation*, this Court clearly articulated the limits of a State's taxing power regarding a nonresident's income:

> "**For nonresidents**, *in contrast*, jurisdictions generally may tax **only income earned *within the jurisdiction***. See *Shaffer v. Carter*, 252 U.S. 37, 57, 40 S.Ct. 221, 227, 64 L.Ed. 445 (1920) (as to residents, a State 'may, and does, exert its taxing power over their income from all sources'; **as to nonresidents**, '*the tax is only on such income* as is derived from . . . **sources [within the State]**')"

Oklahoma Tax Comm'n v. Chickasaw Nation, 115 S.Ct. 2214, 2222 n.11 (emphasis added).

By relying on *Maxwell* to uphold Oklahoma's exertion of its taxing power to nonresidents' extraterritorial income **derived from sources** beyond the borders of the State, the Oklahoma Court of Appeals inappropriately extended and misapplied a prior decision of this Court. Accordingly, certiorari should issue in this case.

B. The Opinion Below Presents Important Questions Touching The Accommodation Of State And Federal Interests Under The Constitution.

This Court may grant certiorari when the state court decision seems "to present important questions touching the accommodation of state and federal interests under the Constitution." *Kosydar v. National Cash Register Co.*, 417 U.S. 62, 65 (1974). The issue in *Kosydar* was whether the assessment of an ad valorem personal property tax by the State of Ohio pursuant to its state tax laws upon certain property in storage awaiting export was in conflict with the federal Constitution's Import-Export Clause, Art.I, § 10, cl. 2, which pro-

vides exports with immunity from state taxation. The Ohio Supreme Court had interpreted the federal constitutional provision in conjunction with the State of Ohio's tax laws. Because this Court determined that "the case seemed to present important questions touching the accommodation of state and federal interests under the Constitution", certiorari was granted.

The issue raised by the Petition is whether the State of Oklahoma's inclusion of a nonresident's extraterritorial income having no nexus to the State offends the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Because this case also seems to "present important questions touching the accommodation of state and federal interests under the Constitution", this Court should grant certiorari.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: August 7, 1997.

Respectfully submitted,

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